Miami Stage Employees Union, Local 545, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL–CIO (Greater Miami Opera Assn.) ***and*** **Andrea Wilson.** Case 12–CB–3445

March 19, 1993

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

DECISION AND ORDER

On October 28, 1992, Administrative Law Judge William A. Pope II issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified.

The judge found, inter alia, that the evidence establishes that the Respondent Union discriminated against electrician Andrea Wilson by refusing to refer her to the Greater Miami Opera Association's second and fifth operas of its 1990–1991 season. He concluded, however, that the Respondent violated Section 8(b)(1)(A) and (2) only with respect to its refusal to refer Wilson to the second opera in January 1991, essentially because the fifth opera, which was staged in April 1991, is not specified in the complaint. The General Counsel has excepted to the judge's interpretation of the complaint and urges the Board to find an additional violation based on the Respondent's refusal to refer Wilson to the fifth opera.

We find, in agreement with the General Counsel, that the references in the complaint[2] to the Respondent's refusal ''to refer all employees requested by name,'' and to the consequences of its conduct ''since on or about January 8, 1991,'' reveal that the complaint is not limited solely to the second opera, the only referral violation found by the judge. Rather, we find that the complaint is sufficiently broad to encompass other refusals to refer in addition to the second opera production in January 1991. In these circumstances, including the judge's own finding that the Respondent's refusal to refer Wilson for the fifth opera was fully litigated and proven, we find that the Respondent's refusal to refer Wilson to the fifth opera production separately violated Section 8(b)(1)(A) and (2). We shall therefore amend the judge's conclusions of law, Order, and notice accordingly.[3]

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 4.

''4. In January and April 1991, the Respondent violated Section 8(b)(1)(A) and (2) by failing and refusing to refer Andrea Wilson, the Charging Party, to the Employer for work on operatic stage productions when she was requested by the Employer by name, and by failing to timely inform the users of the hiring hall referral system of a significant change in its referral system.''

ORDER

The National Labor Relations Board adopts the recommended Order of administrative law judge and orders that the Respondent, Miami Stage Employees Union, Local 545, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL–CIO, Miami, Florida, its officers, agents, and representatives, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 2(a).

''(a) Make Andrea Wilson whole for any loss of earnings suffered as a result of the discrimination against her, occasioned by refusing to refer her to the Greater Miami Opera Association when she was specifically requested by name, by payment to her of a sum of money equal to that which she normally would have earned from the dates of the discrimination practiced against her, i.e., from on or about January 9, 1991, and April 8, 1991, until completion of the scheduled performances of the second and fifth operas, respectively, of the 1990–1991 season produced by the Greater Miami Opera Association, plus interest, less

[1] The Respondent Union did not file exceptions to any of the judge's findings.

[2] The pertinent complaint paragraphs read as follows:

8. On or about January 8, 1991, the Respondent departed from the referral requirements of the collective-bargaining agreement . . . in an arbitrary manner by refusing to refer all employees requested by name by the Employer, and by failing to timely and fully inform employee-users of its referral system of such change in its referral procedures.

9. Since on or about January 8, 1991, Respondent, as a consequence of its acts and conduct . . . has caused and attempted to cause the Employer to discriminate against Wilson by failing and refusing to refer her to the Employer.

[3] The General Counsel, after filing limited exceptions to the judge's decision, has moved the Board to remand this proceeding to the Regional Director for the purpose of obtaining compliance pursuant to a settlement agreement between the General Counsel and the Respondent over the objections of the Charging Party. The General Counsel further requests that the Board retain jurisdiction over this proceeding until full compliance is achieved, without prejudice to reinstating the General Counsel's exceptions, ''in the event the Board approves'' the settlement. We note, however, that no settlement is actually before the Board for approval. In these circumstances, we shall deny counsel for the General Counsel's motion at this time.

net earnings during such periods, in the manner set forth in the remedy section of this decision.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT operate our exclusive hiring hall and referral system for referral of employees to the Opera Guild of Greater Miami, Inc., d/b/a the Greater Miami Opera Association, in a discriminatory or arbitrary manner, or in any way based on membership, rules and regulations, or in any other manner not in accordance with the terms and conditions of our collective-bargaining agreement with the Greater Miami Opera Association, and WE WILL NOT fail to timely and fully inform all users of our hiring hall and referral system of significant changes in the operating procedures and rules of the hiring hall and referral system.

WE WILL NOT fail or refuse to honor requests made by the Greater Miami Opera Association, pursuant to our collective-bargaining agreement, for referral of specific named individuals, if possible.

WE WILL NOT in any like or related manner restrain or coerce employees, members, job applicants, or registrants in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL NOT make Andrea Wilson whole for any loss of earnings suffered as a result of our discrimination against her by our refusal to refer her to the Greater Miami Opera Association when she was specifically requested by name, by payment to her of a sum of money equal to that which she normally would have earned from the dates of the discrimination, on or about January 9, 1991, and April 8, 1991, until completion of the scheduled performances of the second and fifth operas, respectively, of the 1990–1991 season produced by the Greater Miami Opera Association, plus interest, less net earnings during such periods.

MIAMI STAGE EMPLOYEES UNION, LOCAL 545, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL–CIO

Maria Kaduck-Perez, Esq., Eduardo Soto, Esq., for the General Counsel.

Joseph Kaplan, Esq., of Miami, Florida, for the Respondent Miami Stage Employees Union, Local 545.

DECISION

WILLIAM A. POPE II, Administrative Law Judge. In the complaint and notice of hearing, dated August 16, 1991, the Regional Director Region 12 of the National Labor Relations Board (the Board) charges that the Respondent Miami Stage Employees Union, Local 545, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL–CIO (Greater Miami Opera Association) (Local 545 or the Union), violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) by refusing to refer all employees requested by name by the Opera Guild of Greater Miami, Inc., d/b/a the Greater Miami Opera Association (Miami Opera Association), by failing to timely inform the employee-users of the Union's referral system of such change in its referral procedures, by discriminating against Andrea Wilson, the Charging Party, by failing and refusing to refer her to the Miami Opera Association, and by causing or attempting to cause the Miami Opera Association to discriminate against its employees in violation of Section 8(a)(3) of the Act. The charge in this case was filed on January 17, 1991. Trial was held before Administrative Law Judge William A. Pope, II, in Miami, Florida, on November 21 and 22, 1991, and January 21 and 22, 1992.

Background

The Opera Guild of Greater Miami, Inc., d/b/a the Greater Miami Opera Association is a nonprofit organization which produces and performs operas and other musical productions in Miami and Ft. Lauderdale, Florida. The Miami Opera Association is controlled by its board of directors composed of community officials and private individuals. The Opera Association's full-time administrative staff is headed by its general director and its artistic director. Under them is a six-person executive staff, one member of which is the assistant general manager, who serves as the general director's assistant. At all times relevant to this proceeding, the assistant general manager was Paul Lapinski. Under the assistant general manager are the technical director and the production tour coordinator, both of whom are full-time employees. At

all times relevant to this proceeding, the technical director was Max Newhart. Under the technical director are a seasonal staff of people including department heads, stage managers, and costume coordinators who are hired for the entire opera season. Under the department heads are employees such as electricians, carpenters, and other types of stagehands, who are hired on a per-show basis.

Since at least 1972, the Miami Opera Association has obtained stagehands for its musical productions in the Miami area by referral from the Union, the Miami Stage Employees Union, IATSE, Local 545. At all times relevant to this proceeding, the Miami Opera Association and the Union were parties to a collective-bargaining agreement effective during the period from January 1, 1989, through December 31, 1991, covering a wide variety of work related to the staging of the Opera Association's musical productions in the Dade County Auditorium, the Jackie Gleason Theater of the Performing Arts, and other professional facilities in the Greater Miami, Florida area. Under the terms of the collective-bargaining agreement, the Miami Opera Association agreed that it will use qualified employees referred by the Union to perform stagehand work covered by the agreement. The broad categories of work performed by employees referred by the Union includes ''all carpentry, electrical, property and related work.''[1]

Article II of the collective-bargaining agreement provides, in pertinent part, that:

> 1. The GMOA [Greater Miami Opera Association] agrees to contact the Union Business Agent for the purposes of providing employees to work under the terms of this AGREEMENT and the UNION agrees to honor the GMOA's request for specific named individuals, is possible. It is further agreed that this hiring arrangement shall be non-discriminatory and referral or hiring of employees shall in no way be based upon union membership, rules or regulations. The UNION agrees that the GMOA and the employees may sign individual agreements which bind the employees to work for the GMOA during a specific period of time. Nothing in the individual agreements shall supercede this basic agreement.
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> 2. The GMOA shall notify the UNION of its manpower requirements and the Union shall not send nor require GMOA to employ more stagehand employees than it requested . . . .
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> . . . .
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> 4. GMOA's Heads of Departments have the right to reject any employees referred by the Union, but determination that a man is unacceptable will be made by the Head only on the basis of professional Knowledge or after a reasonable trial period . . . .
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> 5. GMOA Heads of Departments shall have the right to name their own key persons subject to approval by the GMOA Technical Director or Director of Production.

Article III, section A, Opera Heads, grants the Opera Association the ''sole authority and responsibility to name and hire the Opera Heads of Departments and the Opera Heads of Departments have total authority to direct the working forces including the House Heads.'' Article III defines GMOA heads of departments as ''persons hired by the GMOA to be responsible to supervise the various department crews to 'Take-in', 'Put-on', 'Take-out' during the opera season. Normally there will be a Head Carpenter, a Head Electrician and a Head Propertyman.''

At all times relevant to this proceeding, the department heads were Gerald Len Howard, master electrician, Al Suarez, master carpenter, and Joseph Sirpico, property manager.

On May 4, 1986, the Union adopted ''Hiring and Referral System Rules and Regulations.'' These rules and regulations were in effect at all times relevant to this proceeding. Oversight for operation of the referral system is vested in a ''permanent Referral Committee'' made up of five members, four of whom are appointed by the executive board of the Union, two of whom are to be members of the executive board and two are to be members of the Union but not the executive board, and a fifth member, who is to be chairman, appointed by the president of the Union. Responsibility for the daily operation of the hiring and referral system is vested in the Union's business agent.

The rules and regulations of the Union's referral system establish three referral lists, an ''A'' list, a ''B'' list, and a ''C'' list, with different qualifications for each. To be on the ''A'' list, a person must have 3 years' experience, have not had a steady job in the last 30 days, and has to be registered to vote in Dade, Collier, or Monroe Counties. If a person qualified for the ''A'' list had worked a steady job within the last 30 days, he was placed on the ''B'' list. A person with less than 3 years' experience and/or not registered to vote in Dade, Collier, or Monroe Counties, qualified for the ''C'' list.[2] In general, the rules and regulations provide that referral of jobs will proceed in descending order according to the date of registration on the ''A'' list, until the ''A'' list is exhausted, then to the ''B'' list, and after it is exhausted, to the ''C'' list.

Issues

a. *Complaint*. The complaint alleges that on or about January 8, 1991, the Union refused to refer all persons requested by name by the Miami Opera Association, and failed to inform the employee-users of the Union's referral system of the change in procedures. The complaint further alleges that as a consequence, the Union caused or attempted to cause the Opera Association to discriminate against its employees in violation of Section 8(a)(3). By its actions, the Union is alleged to have violated Section 8(b)(1)(A) and Section (2).

[1] Included is ''work performed on or in connection with the maintenance, repair, upkeep, setting, striking, dismantling, operation, placement, movement, handling, rigging and/or hanging of any appurtenances or paraphernalia pertaining thereto.'' The Union's jurisdiction includes ''all work performed in GMOA's normal 'Take-in', 'Put-on', and ''Take-out including the removal and restoration of house equipment.'' The specific tasks under the Union's work jurisdiction include ''the handling of all stage or theatrical accessories, scenery, projection equipment, drops, travelers, maskings, platforms, risers, turntables, traps, hand trucks, dollies, lifts, rigging, stage floors, railings, theatrical scaffolding and the like.''

[2] The hiring and referral system rules and regulations further defines experience and steady job, as it uses the terms.

b. *Answer*. In its answer, as amended at trial, Respondent admitted all of the allegations of the complaint, except those contained in paragraphs 7 through 11, which allege that the Respondent violated the Act by committing unfair labor practices.

c. *General Counsel's Position*. General Counsel argues that the Greater Miami Opera Association had a contractual right under the collective-bargaining agreement to request stagehands by name through the Union's referral system, and that Respondent Union violated Section 8(b)(1)(A) and (2) by refusing to honor the Opera Association request for referral of Andrea Wilson, an employee whom the Opera Association had requested by name for its second and fifth operas of the 1990–1991 season. Alternatively, General Counsel asserts that even if Respondent did not breach the collective-bargaining agreement, the evidence establishes that it was the Union's past practice to honor requests for individuals by name from the Opera Association, and, therefore, it breached its duty of fair representation by failing to notify users of its hiring hall of changes in its referral procedures, also in violation of Section 8(b)(1)(A) and (2).

d. *Respondent's Position*. Respondent contends that the language in the collective-bargaining agreement relied upon by the General Counsel to support his argument that the Opera Association had a contractual right to request any and all employees by name does not, in fact, grant such a right to the Opera Association. The Union asserts that its contractual agreement to honor the Opera Association requests for specific named individuals is modified by the words ''if possible,'' and that its reasonable interpretation of the contractual language has always been that specific requests would be honored only in accordance with the Union's referral procedures. Respondent contends that it has consistently interpreted the contractual language to the effect that no ''C'' list people will be referred until the ''A'' list has been exhausted, and that the Opera Association never challenged the Union's interpretation through the grievance procedure or otherwise. The Union contends that the evidence, in fact, shows that it did not deviate from established past practices, as General Counsel contends, but instead consistently adhered to established past practices.

I.

Andrea Wilson, the Charging Party, was referred by the Union to the Miami Opera Association as a member of the electrical crew, under the direction of Len Howard, during the 1988–1989, 1989–1990, and 1990–1991 opera seasons. She testified that during that period of time she worked all but four of the Opera Association's productions. During the 1990–1991 opera season, she was referred as part of the Opera's electrical crew for the first opera, held in November 1990, and the third and fourth operas. She was not referred by the Union for the call for the second opera on January 9, 1991, nor the call for the fifth opera in April 1991.

As was customary before each opera production, on the first Wednesday in January 1991, which the parties stipulated was January 2, 1991, Max Newhart, the technical director for the Miami Opera Association, held a production meeting with his department heads to determine the stagehand manpower requirements for the January 1991 opera production, which was to be the second opera production of the 1990–1991 season. Among others attending the meeting were Paul Lapinski, the assistant general manager, Len Howard, the head electrician, and Al Suarez, the head carpenter. At that meeting, the number of employees needed on each of the stagehand crews was set. Len Howard, in undisputed testimony, stated that during the meeting, he set the number he needed for the electrical crew and named the individual employees he wanted to make up the crew. After discussion, his request was approved by Max Newhart. Included on the approved electrical crew list were Andrea Wilson and J. D. Coates. Howard testified that Wilson had started working on the electrical crew 3 years before, and had worked on the crew for the first opera of the 1990–1991 season.

The next day, January 3, 1991, Howard placed a telephone call to the Union's business agent, Daniel Bonfiglio, and told him the names of the people he wanted for the electrical crew for the opera call on January 9, 1991.[3] Bonfiglio replied that he would not send either Wilson or Coates. According to Howard, he reported his conversation with Bonfiglio to Max Newhart. After conferring with Assistant General Manager Lapinski, and at Lapinski's direction, Newhart wrote a letter, which was also signed by Howard and Suarez, the head electrician, listing by name the carpenter and electrical crews needed by the Miami Opera starting January 9, 1991, for its production of the opera ''Cosi Fan Tutti.'' Newhart said that he had the letter delivered to the Union by messenger. Daniel Bonfiglio testified that the letter was slipped under his office door and he received it on January 8, 1991.

On January 9, 1991, Bonfiglio had the first of several discussions with Assistant General Manager Lapinski concerning whether or not the Opera Association had the right to specifically request referral of employees by name, as maintained by Lapinski, and disputed by Business Agent Bonfiglio. According to the credible testimony of Paul Lapinski, during these conversations Bonfiglio stated his feeling that Wilson was not physically qualified for the work, and that she had been offered another call for work during the period, which she had turned down. Bonfiglio stated that Wilson could not pick and choose her calls. Bonfiglio said that Wilson was not on the ''A'' list, which had to be exhausted before people, such as Andrea Wilson, who were on the ''C'' list could be referred. Bonfiglio asserted that the Opera Association could not request people from the ''C'' list.

In subsequent conversations between Bob Huer, the Opera's general director, and Mike McCarthy, the Union's president, an agreement was reached that the Opera Associa-

[3] The opera call on January 9, 1991, was the ''load-in call,'' during which the scenery and equipment needed for the opera production is taken into the theater and the theater is set up for performance of the opera, a process which usually takes several days. There is no separate production call. Stagehands for the run of the show, or performances of the opera, are usually selected from the load-in crew. The load-in and production of the opera usually lasts for about 2-1/2 weeks. After the show ends, the last call for stagehands is the ''load-out call,'' when the Opera Association's sets, equipment, and other property are removed from the theater. The ''load-in call'' is preceded by a ''warehouse call,'' during which Opera's scenery and equipment are loaded onto semitrailers for transportation to the theater where the opera will be performed. The warehouse call lasts from 1 to 3 days. Andrea Wilson was not requested by the Opera Association for the warehouse call for the January 1991 opera.

tion would stop writing letters concerning the dispute and the issue would be left for resolution in on-going contract negotiations. Paul Lapinski credibly testified that he instructed his staff to continue making verbal requests for individuals they wanted on their crews. Lapinski said that Wilson was not sent by the Union as a member of the electrical crew for the second and fifth operas of the 1990–1991 opera season, as specifically requested by name, but that she was sent for the third and fourth operas.

Daniel Bonfiglio, the Union's business agent, testified that on December 26 or 27, 1990, he received a telephone call from Max Newhart, the Opera Association's technical director, during which Newhart informed him how many stagehands would be required for the next opera. Bonfiglio stated that he filled all of the crews needed for the Opera's January 1991 production from the ''A'' list by January 2 or January 3, 1991. On January 4, 1991, Bonfiglio said, he called Andrea Wilson and offered her employment on January 7 and 8, 1991, at the Miami Beach Theater of the Performing Arts. He recalled that she asked him why he was not putting her on the opera crew, and he replied that the opera call for January 9, 1991, had been filled from the ''A'' list.

Andrea Wilson testified that on or about January 4, 1991, she received a telephone call from Daniel Bonfiglio, the new business agent of the Union, asking her if she was available for work the next week. She replied in the affirmative, and Bonfiglio offered her work at the Theater of the Performing Arts on January 7 and 8. In response to her inquiry about the Opera call on January 9, 1991, Bonfiglio told her that it was filled. She said that she did not report for the work offered by Bonfiglio because she was ill. According to Wilson's undisputed testimony, Bonfiglio called again, offering her work on January 13, 1991.

Len Howard, the Opera Association's head of the electrical department for the 1990–1991 season, and a member of Miami Stage Employees Union, Local 545, credibly testified that after the January 1991 opera production, he was called before the Union's executive board, and was told not to sign any letters originating from the Opera, and that he could only request his key assistant by name. As a result, he said, he did not specifically request anyone by name for the third and fourth operas. He further testified that he did specifically request Wilson from Dan Bonfiglio for the fifth opera, because she had been referred for the fourth opera and he thought there was no longer any problem with requesting her. When he communicated his request to Business Agent Bonfiglio, the latter responded that he was ''going to send who he was going to send.'' It is undisputed that Wilson was not referred by the Union for the fifth opera. Howard testified that he did not recall that Bonfiglio gave him any reason for not referring Wilson.

Business Agent Bonfiglio testified that he filled the calls for the third and fourth operas of the 1990–1991 season from the ''A'' list first, and after it was exhausted, from the ''C'' list. He said that he knew Len Howard liked Andrea Wilson, and since he could accommodate Howard in this regard, he sent Wilson to make things as smooth as possible.[4] He said that the Opera Association did not request anyone by name for either the third or fourth operas.

Business Agent Bonfiglio stated that he received the number of stagehands needed for the fifth opera from Max Newhart, and filled the crews from the ''A'' list and with apprentices. Since the ''A'' list was not exhausted, he could not send people from the ''C'' list. He acknowledged that he received a telephone call from Andrea Wilson asking why she was not being referred for the fifth opera. He said he told her that the past practice was to fill opera calls with apprentices and from the ''A'' list first. Bonfiglio said that after he had filled the crews for the fifth opera, and at most 3 days before the call for the opera, he received a message from Len Howard on his answering machine requesting Andrea Wilson. He added that there was nothing he could do because he had filled the call with ''A'' list people and apprentices. While the fifth opera was in production, he had a conversation with Max Newhart in which he asked Newhart why the Opera Association had requested Wilson after word had come down that there would be no more requests. Newhart replied that there could still be verbal requests, just no written requests.

Technical Director Newhart credibly testified that he learned from Len Howard that the Union was not going to refer Wilson for the fifth opera, as Howard had requested. Newhart said that he spoke to Business Agent Bonfiglio before April 9, 1991,[5] and Bonfiglio said that he was not going to send Wilson because he did not feel she was qualified to do the work.

Andrea Wilson, in credible and undisputed testimony, stated that on April 8 or 9, 1991, she received a message from Business Agent Bonfiglio offering her work at IBM on April 13 and 14. She said the load-in call for the fifth opera was at about that time and the job offered to her would have precluded her from working on the fifth opera. She said she then had conversations with Paul Lapinski and Len Howard, during which she was told that she had been requested by name for the fifth opera in April 1991. Subsequently, she received another message on her answering machine from Bonfiglio, during which he berated her for speaking to opera management, and said that she would get her calls through the hiring hall and him personally. In a subsequent conversation with Bonfiglio, he told her that he had to follow certain work lists, and she was only on the ''C'' list and he had put others who were ahead of her on the list on the opera call.

The evidence of record shows that Andrea Wilson was regularly referred to the Opera Association from the 1988–1989 season and succeeding seasons until January 1991, at the specific request of the Opera Association, with the exception of several shows, for which no reason is given. In any event, there is no evidence that at any time prior to January 1991, the Union refused to refer Wilson claiming that she was on the ''C'' list and could not be reached because the ''A'' list was not exhausted.

Although the Union's newly appointed business agent, Daniel Bonfiglio, claimed that he could not refer Wilson to the Opera Association in January 1991 and again in April 1991 because the ''A'' list was not exhausted, that claim appears to be contrived and pretextual. Both in January 1991,

[4] Business Agent Bonfiglio stated that Wilson was not at the top of the ''C'' list and perhaps he could have sent her to another theater. He said that because she had worked on operas, he put her on the opera call for the third opera to accommodate the Opera and her.

[5] Newhart said he would not be surprised if the Union's records show that the load-in call for the fifth opera was on April 11, 1991.

for the second opera of the season, and in April 1991, for the fifth opera of the season, while claiming he could not refer her for work at the opera because the ''A'' list had not been exhausted, in fact, Bonfiglio offered her referrals at about the same time to other shows. The opera call for the second show was on January 9. On January 4, 1991, Bonfiglio, while claiming that he had filled the opera call for January 9 from the ''A'' list by January 2 or January 3,[6] offered her work on January 7 and 8 on another show. The clear implication here is that Bonfiglio could have referred her to the opera, as he was requested to do, and referred someone else for the January 7 and 8 calls, if he had chosen to do so.[7] The dates are less precisely established concerning the April 1991 opera call and other contemporaneous work offered to Wilson, but the same conclusion appears equally warranted. I find this to be strong evidence that whatever Bonfiglio's reasons may have been for departing from past practice concerning honoring the Opera Association's specific requests for Andrea Wilson, it was not because he had no alternative since she was on the ''C'' list and the ''A'' list, which had preference, in the Union's view, was not exhausted.

II.

General Counsel contends that it was the parties' past practice for the Union to refer all employees requested by name by the Opera Association if the employee was available, and that the Union violated the Act by changing its past practice without timely notice to the users of the hiring hall of the change in referral procedures. The Union, for its part, denies that the General Counsel has accurately stated the parties' past practice. Instead, asserts the Union, the parties' past practice was that the Union would honor the Opera Association's requests by name for people on the ''C'' list only when the ''A'' list was exhausted. The Opera Association's requests by name in the past had been honored only because the requested employee was on the ''A'' list. The Union acknowledges that departures from established hiring hall procedures which result in a denial of employment inherently encourages union membership, and constitutes a discriminatory practice in violation of Section 8(b)(1)(A) and (2). However, there was no discrimination in this case, because, consistent with past practice, the Union had referred out Andrea Wilson, who was on the ''C'' list, whenever the ''A'' list had been exhausted and she had not been referred when it was not.

The collective-bargaining agreement requires the Opera Association to contact the Union's business agent for its stagehand manpower requirements, and the Union to send the number of stagehands requested. Paul Lapinski, the Opera Association's assistant general manager, whom I find to be a credible witness, began his employment in July 1989 as the director of production. He stated that he was, and still is, responsible for the physical production of the Opera Association's musical productions. The practice followed by the Opera Association since he has been there is that the director of production and the technical director, with the director of production having the greater authority, have the responsibility for contacting the Union to obtain needed stagehands. At the time Lapinski was hired, the position of technical director was vacant, and it remained vacant until Max Newhart was hired as technical director in September 1990.

Lapinski said that the practice he followed was to give the business agent the numbers of various types of stagehands required by the Opera Association for a particular production, for example electricians or carpenters, and then the departments heads conferred with the business agent, in person or by telephone, and through a cooperative process selected from the manpower pool available the people they wanted on their crews. Lapinski stated that the department heads requested stagehands by name, and that on occasion the department heads reported to him that certain men were on other jobs and were unavailable. He said that no problems requiring action in writing were reported to him through December 1990; however, there was an indication of a problem in November 1990, involving manning of a warehouse call, as reported to him by Max Newhart.

Max Newhart, whose testimony I also find to be credible, testified that after the Opera Association's manpower requirements for a show were established, he called the Union's business agent and let him know the number. After that the department heads either called or spoke to the business agent in person concerning the make up of the crews. The procedure was slightly different if it was determined that additional stagehands were needed after an opera was in production. Then, Newhart said, requests for employees were made through the shop steward.

Newhart testified that a problem arose in November 1990, with a request made through the shop steward for a warehouse call. Newhart said that he requested individuals by name, and gave the shop steward a piece of paper upon which he had written the names of the individuals he wanted. The shop steward to whom he gave the paper was Sal Bonfiglio, who is Business Agent Daniel Bonfiglio's father. The Union did not honor the request in full. It sent substitutes for two of those requested by name. One of the substitutes was Daniel Bonfiglio.

The only department head to testify was Len Howard, who has been hired by the Opera Association as head electrician for each opera season since 1982. I find Howard to be a forthright and convincing witness. Howard is a union mem-

[6] I do not credit Daniel Bonfiglio's testimony regarding the timing of the Opera Association's requests and his actions. I find his version of the sequence of events to be contrary to the evidence. He said that he received a telephone call from Max Newhart on December 26 or 27, 1990, during which he learned from Newhart the number of stagehands which would be required for the January show, and that he finished filling the call by January 2 or January 3, 1991. Max Newhart's credible testimony shows, however, that the number of stagehands needed for the January show was not determined until the Opera Association's production meeting on January 2, 1991, and it was after that meeting that Newhart spoke to Bonfiglio. Len Howard credibly testified that he spoke to Bonfiglio on January 3, and specifically requested Wilson and another stagehand named J. D. Coates. One day later, on January 4, Bonfiglio offered Wilson other employment on January 7 and 8.

[7] It appears that Bonfiglio, according to his own testimony, exercised considerable discretion in determining who to refer for calls, based on his own idea of who was most suitable, wanted the work, and was available. He said that he did not have to refer Wilson for the third and fourth shows, but since he could reach her on the list, he referred her as an accommodation to the Opera Association. The clear implication here is that he did not refer her necessarily because she was at the top of the list, numerically, but instead, exercised discretion and referred her even though he was not compelled to do so.

ber. His employment by the Opera Association as head electrician is seasonal, lasting only part of the year. He has a yearly contract with the Opera Association, which may or may not be renewed at the start of the next opera season. He depends upon the Union's hiring hall for work referrals, either to supplement or replace his work for the Opera Association. Considering his dependence upon the Union's hiring hall for work, I find that he has no motive to testifying untruthfully.

He stated that after the size of his crew was approved by the Opera Association's technical director, he spoke with the Union's business agent, either by telephone or in person, concerning the make up of his crew. He said that he spent the most time with the business agent in selecting the crew for the first show each season, since he was basically setting up the crew for the year. Usually, the business agent showed him a list, or told him verbally, who was available, and he indicated those he wanted and those he did not want.[8] He said he sometimes requested people who he knew were available, but were not included on the business agent's list. He said that his requests for individuals by name were always honored by the Union while its business agents were Mike McCarthy and his successor, Arnie Shupnick,[9] although on occasion he would be informed by the business agent that a particular person he requested was committed for another show and was not really available. He said his requests for Andrea Wilson were always honored until the second opera of the 1990–1991 season in January 1991, when the business agent was Daniel Bonfiglio.

When pressed for names of specific individuals he had requested since 1982, Howard named five, in addition to Andrea Wilson. He said there could have been more than four, and probably were, but he did not recall them. He said that he had been involved as a union member in establishing the ''A,'' ''B,'' and ''C'' list referral system adopted by the Union in 1986, but he was never presented ''A,'' ''B,'' or ''C'' lists by the business agents, and he could not say whether the four he specifically requested were on the ''A'' list when he requested them.[10]

Howard said that Business Agent McCarthy would usually show him a list, but not a list designated as ''A,'' ''B,'' or ''C,'' of not more than 20 names written on a piece of paper, and would tell him that they were the ones available. He said that when people he wanted were on the list, there was no problem. If people he wanted were not on the list given to him by McCarthy, he asked for them, and if they were available and not committed to another show, received them.

Mike McCarthy testified that while he was the Union's business agent, he had meetings, in person or by telephone, with the department heads, from whom he obtained the number of stagehands needed by the Opera Association for a particular opera. He said that he referred people to the Opera Association by going down his ''A'' list, and rarely referred people from the ''B'' or ''C'' list. He said that the Opera Association frequently requested apprentices, who were referred under a different system, but that never in his experience did they request someone from the ''C'' list. He said he never received a list from the Opera Association of people they wanted by name. He said the only people the Opera Association requested by name were apprentices and key assistants, who the heads of departments had the right under the collective-bargaining agreement to choose. He said the people Howard requested were on the ''A'' list.

Arnold Shupnick was unavailable as a witness because of ill health, and the parties agreed to a stipulation of his expected testimony. In his stipulated testimony, Shupnick, who said that he was the Union's business agent from 1987 to 1990, said that it was his practice to refer ''A'' list people to the Opera and to go to the ''C'' list only if the ''A'' list was exhausted. Shupnick said that the Opera Association did not regularly request people by specific name, but that Len Howard wanted to use Andrea Wilson, and he was able to send her from November 1987 through November 1990, because the ''A'' list was exhausted and he was able to go the ''C'' list. Before the start of the 1990–1991 opera season, according to Shupnick's stipulated testimony, he told Andrea Wilson that he might not be able to send her to the opera because the ''A'' list had been increased by out-of-work stagehands from another theater, but for the first show, in November 1990, the ''A'' list was exhausted and he was able to refer her to the opera from the ''C'' list.

I find that the preponderance of the evidence shows that from at least 1982 to November 1990, when Daniel Bonfiglio assumed the position of the Union's business agent, the system under which the Union supplied stagehands to the Opera Association worked smoothly, apparently to the satisfaction of both parties. In practice, for the first opera of each season, the Opera Association obtained the basic crews who remained in tact for the rest of the shows of the season. There were additions to and subtractions from the crews for various reasons, including addition of people with particular skills requested by name by the Opera Association to fill its need for someone with those skills for a particular opera.

Usually, after the number of stagehands needed for an opera had been communicated to the business agent, the business agent showed lists of people available from which Head Electrician Howard made his selections. The lists were never identified by the business agent as ''A,'' ''B,'' or ''C'' lists. From time to time, Len Howard, as the head electrician, requested people by name from the Union, and if those people were available, in the sense that they were not already committed to another job, the Union sent them. One of those requested by name by Howard was Andrea Wilson, who was part of the electrical crew referred for each show from November 1987 through November 1990, with two or three exceptions. There is no evidence that the Union, through its business agent at the time, Arnie Shupnick, ever refused to refer Wilson, or anyone else, because he or she was on the ''C'' list and the ''A'' list, which had preference, was not exhausted.

The evidence of record indicates that when Howard requested someone by name, from either Business Agent McCarthy or Business Agent Shupnick, they tried to accommodate the requests, and only when the requested person was

[8] Howard said that his first show as head electrician was in 1982, and Business Agent McCarthy had picked his crew for him, because he had been hired late for the first production. After that show, he said, he started changing the crewmembers for subsequent shows.

[9] Mike McCarthy, now president of the Union, testified that he was business agent from 1972 through December 1986 or 1987. He said his replacement was Arnie Shupnick. Shupnick was replaced as business agent by Daniel Bonfiglio in December 1990.

[10] Respondent offered testimony that they were either apprentices or on the ''A'' list.

already committed to another show was a request not honored. There is no specific evidence of record concerning whether or not other department heads also requested referral of stagehands by name, but the Opera Association's assistant general manager, Paul Lapinski said that under the collective-bargaining agreement they had that authority, and no one reported difficulties, other than that a requested person was already committed elsewhere, to him.

I find the testimony of the General Counsel's witnesses concerning the practice followed by the Opera Association and the Union in referring stagehands from 1982 to November 1990 to be more reliable and credible than the testimony of Respondent's witnesses.

Former Business Agent McCarthy's testimony concerning practices he followed prior to 1987, a period of time which is relatively remote to the time of the controversy at issue here, does not rebut the testimony, principally by Head Electrician Howard, concerning referrals before 1987. It is possible that, as he testified, McCarthy followed the Union's internal procedure of referring ''A'' list people before ''C'' list people, but if he did, it was not done by agreement with the Opera Association, or, even with the Opera Association's knowledge. There is no evidence that former Business Agent McCarthy ever informed the Opera Association that he made referrals from the ''A'' list until it was exhausted, and only then from the ''C'' list. There is, in short, no credible evidence that the Opera Association knew what specific method the Union was using to refer stagehands, let alone that it agreed to acquiesced in giving preference to ''A'' list people over the Opera Association's requests for specific named individuals. Although McCarthy testified that he did not recall that the Opera Association requested people by name, he seems to have acknowledged that practice when he testified that the people Howard requested were on the ''A'' list.

More relevant, because it occurred more recently, to the question of the parties' past practice is the testimony, by stipulation, of Former Business Agent Shupnick, relating to the period from 1987 to November 1990, the 3-year period immediately preceding the refusal of newly appointed Business Agent Daniel Bonfiglio to refer Wilson and one other person requested by name by the Opera Association for its January 1991 opera production. Whatever may have been Shupnick's practice with respect to the use of giving preference in making referrals to people on the Union's ''A'' list, over people on its ''B'' and ''C'' lists, he did not say that the Opera Association agreed or acquiesced, or even knew what his practice might have been. He did not dispute that the Opera Association sometimes requested people by name, and he said that he was able to comply with Head Electrician Howard's specific request for Andrea Wilson, who was on the ''C'' list for every show, with two or three exceptions for which no reason is given, from November 1987 to November 1990. Thus, if the question of lists was a factor in his referrals, it apparently never arose as a problem for the Union in making referrals to the opera, and was never a subject of discussion with the Opera Association's management.

On this record, I find that it was the Opera Association's past practice to request referral of stagehands by name from time to time. The evidence is unconvincing that it was the parties' practice to limit the Union's contractual obligation to honor such requests by the Union's internal and unilaterally adopted procedures for establishing preferential hiring lists. Until November 1990, when the Opera Association requested referral of stagehands by name, it was the Union's practice to honor such requests, unless the individual requested was already committed to work on another show.

III.

The collective-bargaining agreement in effect between the Opera Association and the Union at the time relevant to this proceeding contains explicit language granting the Opera Association the right to request referral of specific named individuals, and requiring the Union to honor the Opera Association's specific by name requests, if possible. The collective-bargaining agreement further provides that referral will not be based upon union membership, rules, or regulations. The Opera Association agreed that work covered by the collective-bargaining agreement will be performed by qualified employees referred by the Union, but reserved the right to contract with employees individually to work for the Opera Association for a specified period of time. The Union is obligated under the collective-bargaining agreement to endeavor to refer employees who will work both rehearsals and performances.

The collective-bargaining agreement does not define qualifications for referral, and the Opera Association has the right to reject any employee referred by the Union, upon a determination by the head of department, based upon prior professional knowledge or a reasonable trial period, that the employee is unacceptable. Nothing in the collective-bargaining agreement requires the Union to establish a referral system based upon seniority status of employees, as determined by placement of them by the Union on ''A,'' ''B,'' and ''C,'' or other lists prepared and maintained by the Union, based upon qualifications determined by the Union on such factors as years of experience (based upon ''at least 1200 hours of work in the past twelve (12) months in the industry in Dade, Collier or Monroe Counties''),[11] whether or not the employee had a ''steady job'' within the last 30 days,[12] or where the employee is registered to vote.[13] The contents of the ''Hiring and Referral System Rules and Regulations'' which the Union unilaterally adopted in 1986, in fact, are not based upon anything contained in the collective-bargaining agreement, and there is no evidence that the Opera Association ever agreed to be bound by them.

In *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961), the Supreme Court held that hiring halls are not banned in any provision of the Act. Section 8(a)(3) of the Act prohibits discrimination in hiring which encourages or discourages membership in a labor organization. The Court said at 365 U.S. 666-667, that ''the hiring hall, under the law as it stands, is a matter of negotiation between the parties . . . . [The Board's] power, so far as relevant, is restricted to the elimination of discrimination.'' Since there was a prohibition in the collective-bargaining agreement at issue in that case, prohibiting discrimination based upon union membership, the Court held that ''the Board is confined to determining

[11] R. Exh. 6, ''Hiring and Referral System Rules and Regulations,'' adopted May 4, 1986.

[12] Id.

[13] Id.

whether discrimination has in fact been practiced.'' 365 U.S. at 667.[14]

The Board has held that a union operating a hiring hall violates Section 8(b)(1)(A) and (2) if it fails to follow clear and unambiguous standards set out in a collective-bargaining agreement. In *Cell-Crete Corp.*, 288 NLRB 262, 264 (1988), the Board held that:

> A union which operates a hiring hall must represent all individuals seeking to utilize that hall in a fair and impartial manner. In this regard, the Board has held that notwithstanding the absence of specific discriminatory intent, ''any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant . . . inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (b)(2),'' absent demonstration of a legitimate justification. In addition the failure to give timely notice of a significant change in referral procedures is a breach of a union's duty to represent job applicants fairly.

In *Operating Engineers Local 406 (Ford, Davis & Bacon Construction)*, 262 NLRB 50, 51 (1982), citing *Plumbers Local 392 (Kaiser Engineers)*, 252 NLRB 417, 418 (1980), the Board said:

> The Board has held that any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function.

In his concurring opinion in *Plumbers Local 392*, supra, 252 NLRB at 418, Chairman Fanning said that:

> [W]here referral under an exclusive hiring hall agreement is conditioned upon clear and unambiguous standards set forth in that agreement, the refusal to refer an employee who qualifies for referral under such standards, without more, suffices to establish, prima facie, a violation of Section 8(b)(1)(A) and (2) of the Act.
>
> Thus, under an exclusive hiring hall arrangement a labor organization is under a duty to conform with and apply lawful contractual standards in administering registry, preference, and referrals, and any departure therefrom resulting in a denial of employment to a member falls within that class of discrimination which inherently encourages union membership.

The Board has applied the principle that a union violates Section 8(b)(1)(A) and (2) when it fails to refer an employee or applicant for employment, in accordance with the terms of an exclusive hiring hall referral system, to situations in which a union refuses to honor a specific name request made by an employer pursuant to a collective-bargaining agreement allowing for such requests. In *Painters Local 1555 (Alaska Constructors)*, 241 NLRB 741, 742 (1979), the Board said:

> The Board has consistently held that a union violates Section 8(b)(1)(A) and 8(b)(2) when it discriminatorily refuses to refer an employee or applicant for employment pursuant to the terms of an exclusive referral system. In the instant case, it is clear that on July 20, 1977, ACI made a specific name request at Respondent's hiring hall for Strickland's dispatch and that, pursuant to its collective-bargaining agreement with ACI, Respondent was obligated to dispatch Strickland unless its actions were necessary for the effective performance of its functions as bargaining representative.

In that case the Board found that the union's explanations for refusing to refer the individual who had been requested by name by the employer pursuant to the collective-bargaining agreement were belated and changing and in fact were pretextual, and that the union had discriminatorily refused to dispatch the individual ''for arbitrary and capricious reasons in violation of Section 8(b)(1)(A) and (2) of the Act.'' *Painters Local 1555*, supra, 241 NLRB at 743.

In the instant case, the Union, in operating an exclusive hiring hall under its collective-bargaining agreement with the Miami Opera Association, is required by the clear and unambiguous language in that agreement to honor the Opera Association's requests for referral of specific named individuals, if possible. In the context of the agreement, ''possible'' must be given its usual meaning of something which can be done. Nothing in the agreement suggests that the word ''possible'' as used in the agreement is a synonym for ''permissible,'' as in if permissible under the Union's internal rules governing how it unilaterally chooses to operate the hiring hall. Clearly, under the terms of the collective-bargaining agreement if a specific named individual is ready, willing, and available to work for the Opera Association and it is within the Union's ability to refer him, it must do so.

The evidence in this case unequivocally affirms that Andrea Wilson was ready, willing, and available for referral for employment on the electrical crew for the Opera Association's second and fifth operas of the 1990–1991 season. She was registered with the hiring hall operated by the Union and advised the Union of her willingness to be referred. The Union had agreed in the collective-bargaining agreement that referral would ''in no way be based upon union membership, rules or regulations.'' The Union cannot take refuge behind union rules and regulations which it unilaterally created to escape its contractual obligations under the collective-bar-

[14] Unlike the collective-bargaining in the instant case, the collective-bargaining agreement in the case before the Supreme Court provided that casual employees would be employed in the industry only on a seniority basis from seniority lists kept by, the unions, with service determined upon a minimum of 3 months' service in the industry, ''*irrespective of whether such employee is or is not a member of the union*.'' 365 U.S. at 668. While the collective-bargaining agreement in the instant case prohibits referral by the Union based upon union membership, it does not otherwise require the Union to use any specific referral system, such as the seniority system adopted unilaterally by the Union, and it specifically allows the Opera Association to request referral of employees by name, and requires the Union to honor the requests, if possible.

gaining agreement.[15] It clearly was possible for the Union to refer her, as requested by the Opera Association. Its failure to do so is a prima facie violation of Section 8(b)(1)(A) and (2) of the Act.

Citing *Teamsters Local 525 (Nelson Construction)*, 193 NLRB 724 (1971), and quoting from the Board's opinion in *Iron Workers Local 229 (Bethlehem Steel)*, 183 NLRB 271 (1970), the Union asserts that a union does not violate the Act ''when it fails to refer an employee specifically requested by an employer when the union acts pursuant to a good faith, nondiscriminatory interpretation of a contractual hiring hall provision.'' *Iron Workers Local 229*, supra, however is factually distinguishable from the instant case. In that case, it appears that the collective-bargaining agreement, itself, required the union to maintain ''A'' and ''B'' lists and to accord individuals on the ''A'' list priority in referral over individuals on the ''B'' list. As previously noted, in the instant case the collective-bargaining agreement is completely silent as to how the Union is to run the referral system, other than specifying that the Union must honor the Opera Association's requests for referral of specific named individuals, if possible, and that the ''hiring arrangement shall be nondiscriminatory and referral or hiring of employees shall in no way be based upon union membership, rules or regulations.'' There is nothing in the collective-bargaining agreement concerning according preference to people on one list over people on another list. Thus, in the instant case there is no issue concerning ''a good faith, non-discriminatory interpretation of a contractual hiring hall provision.''

The Union in the instant case principally relies upon the explanation that it was unable to refer Andrea Wilson at the Opera Association's specific by name request for the second and fifth operas of the 1991–1992 season, because it was required under its internal rules (that is, its unilaterally adopted ''Hiring and Referral system Rules and Regulations'' governing its referral system) to first dispatch other employees on its ''A'' and ''B'' lists before it could dispatch someone like Wilson who was on the ''C'' list.[16] The Union's refusal contravened the clear and unambiguous language of the collective-bargaining agreement requiring the Union to honor the Opera Association's requests for specific named individuals. The evidence unequivocally shows that Andrea Wilson was registered with the Union's referral system, and that she was ready, willing, and available for referral to the Opera Association. It was clearly possible for the Union to dispatch her, and under the terms of the collective-bargaining agreement, there is no other exception to the Union's obligation to honor the Opera Association's requests for specific named individuals.

The Union has not demonstrated that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function. Neither has it shown that the clear language of the collective-bargaining agreement had been modified by the parties' past practice. The clause requiring the Union to honor the Opera Association's request for specific named individuals, if possible, was not a ''use it or lose it'' proposition for the Opera Association. In any event, while the Opera Association may not have chosen to frequently request specific individuals over the years it obtained stagehands through the Union's hiring hall (that took place under a number of collective-bargaining agreements preceding the collective-bargaining agreement in effect at the time of the incidents giving rise to this case which was actually effective for only a 2-year period, January 1, 1989, through December 31, 1991), it did so from time to time, and when it did, the Union honored the requests, except when the requested individuals were unavailable because they were committed to other shows.

Therefore, I find that the Union's deviation from established hiring hall procedures by its refusal to refer or dispatch Andrea Wilson for the second opera[17] of the Greater Miami Opera Association's 1990–1991 season was discriminatory, inherently encouraged union membership, and breached the Union's duty of fair representation owed to all hiring hall users, in violation of Section 8(b)(1)(A) and (2) of the Act. I further find that the Union breached its duty to represent job applicants fairly because it did not give the users of its referral system timely notice of this significant change in referral procedures, in violation of Section 8(b)(1)(A). *Cell-Crete Corp.*, supra; *Operating Engineers Local 406*, supra.[18]

IV.

A hotly contested issue arose during the hearing of this case concerning the General Counsel's contention that there was personal animosity between Business Agent Daniel

[15] Respondent contends that the rules and regulations which were established for the referral system operated by the Union under the collective-bargaining agreement, in fact, were not rules or regulations of the Union. I find that to be a specious argument. The referral system which the Union established was created by the Union, approved by the Union's membership, and operated on a day-to-day basis by the Union's business agent from the Union's headquarters. A substantial majority of the individuals who registered for referral were union members. It had no separate existence apart from the Union. What the Union and its members created, the Union and its members could just as easily terminate. The referral system was an alter ego of the Union in every respect. The weight of the evidence firmly establishes that the rules and regulations of the referral system which the Union operated were union rules and regulations.

[16] During the hearing Respondent presented witness testimony to the effect that the Union's business agent did not dispatch Wilson at the Opera Association's by name request, in part, because she was unqualified, or less qualified than others on the referral lists, for the work. It is apparent from the record, however, that the Opera Association considered Wilson to be qualified, and nothing in the collective-bargaining agreement gives the Union the right to override the Opera Association's judgment on that point and superimpose its own determination of who is or is not qualified. Accordingly, I find that to the extent it may have done so in this case, the Union's refusal to refer Wilson on the ground that she was unqualified or less qualified was discriminatory, arbitrary, and capricious, and violated Sec. 8(b)(1)(A) and (2) of the Act.

[17] The failure of the Union to refer Wilson for the fifth opera of the 1990–1991 season, in April 1991, was also established, but that failure is not alleged as violation of the Act in the complaint.

[18] I find it to be an unreasonable stretch of the evidence, and an unnecessary one to the disposition of this case, to find that the Union caused or attempted to cause the Opera Association to discriminate against employees in violation of Sec. 8(a)(3). It was the Opera Association's choice whether or not it requested Andrea Wilson by name, and it can hardly be argued to have violated Sec. 8(a)(3) if for some reason beyond its control it was unable to obtain her after requesting her.

Bonfiglio's father, Sal Bonfiglio, who was the union steward for many years for the operas put on by the Greater Miami Opera Association, and Andrea Wilson, and further, there was animosity by Sal Bonfiglio towards the Opera Association, itself, for what he considered to be age discrimination. The Union strongly objected to the testimony on these issues, contending that such evidence is irrelevant, and denied that animosity existed, let alone was a factor in its actions. The relevance of this animosity is argued to be the possibility that it may tend to establish that Business Agent Bonfiglio's actions concerning Andrea Wilson and the broader issue of the Union's duty to honor the Opera Association's requests for referral of specific individuals may, in fact, have been premised on his father's animosity towards Andrea Wilson and the Opera Association.

I find it unnecessary to reach the issue of animosity, because I find that this issue is irrelevant to the determination of whether or not the Union's actions violated the Act, as alleged in the complaint. My finding that the Union violated the Act even if it took the disputed actions because it believed that it had a contractual right to do so, as it claims, makes it unnecessary to consider whether the Union was actually motivated by some other, less defensible reasons, which, if they could be established, would be patently discriminatory. In view of this finding, I make no findings concerning the issue of animosity.

CONCLUSIONS OF LAW

1. Respondent Miami Stage Employees Union, Local 545 is a labor organization within the meaning of Section 2(5) of the Act.

2. The Employer, the Greater Miami Opera Association, is an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act.

3. At all times material herein, the Respondent and the Employer were parties to a collective-bargaining agreement, which provides that the Respondent shall be the sole and exclusive source of referrals for employment by the Employer for performance of stagehand work, as more particularly defined in article A of the the collective-bargaining agreement.

4. Between on or about January 2 and January 9, 1991, Respondent violated Section 8(b)(1)(A) and (2) by failing and refusing to refer Andrea Wilson, the Charging Party, to the Employer for work on an operatic stage production when she was requested by the Employer by name, and by failing to timely inform the users of its hiring hall referral system of a significant change in its referral system.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent Union engaged in certain unfair labor practices, I recommend that the Respondent be ordered to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent unlawfully caused Andrea Wilson to be denied referral work by the Greater Miami Opera Association from on and after January 9, 1991, Respondent shall be ordered to make her whole for any loss of earning suffered as a result of the discrimination against her by payment to her of a sum of money equal to that which she normally would have earned from the date of the discrimination until completion of the scheduled performances of the second opera of the 1990–1991 season produced by the Greater Miami Opera Association, less net earnings during such period. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1978).[19]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Miami Stage Employees Union, Local 545, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Miami, Florida, AFL–CIO, its officers, successors, and assigns, shall

1. Cease and desist from

(a) Operating an exclusive hiring hall and referral system for referral of employees to the Opera Guild of Greater Miami, Inc., d/b/a the Greater Miami Opera Association, in a discriminatory or arbitrary manner, or in any way based upon union membership, rules or regulations, or in any other manner not in accordance with the terms and conditions of its collective-bargaining agreement with the Greater Miami Opera Association.

(b) Failing or refusing to honor requests by the Greater Miami Opera Association for referral of specific named individuals, if possible.

(c) Failing to timely and fully inform all users of the hiring hall and referral system of significant changes in the operating procedures and rules of the said hiring hall and referral system.

(d) In any like or related manner restraining or coercing employees, members, job applicants, or registrants in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Andrea Wilson whole for any loss of earnings suffered as a result of the discrimination against her, occasioned by refusing to refer her to the Greater Miami Opera Association when she was specifically requested by name, by payment to her of a sum of money equal to that which she normally would have earned from the date of the discrimination, on or about January 9, 1991, until completion of the scheduled performances of the second opera of the 1990–1991 season produced by the Greater Miami Opera Association, plus interest, less net earnings during such period, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all hiring hall records, dispatch lists, referral lists, and other documents

[19] In accordance with the Board's decision in *New Horizons for the Retarded*, supra, interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 622.

[20] If no exceptions are filed as provided by Sec. 102.446 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes.

necessary to compute the amount of backpay due to Andrea Wilson under the terms of this Order.

(c) Post at its business office in Miami, Florida, and its meeting places for members, registrants, or applicants for referral, copies of the attached notice, marked ''Appendix.''[21] Copies of the notice, on forms provided by the Regional Director of Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members, registrants, and applicants for employment are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''